

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

-----In the Matter of----- )  
 )  
PUBLIC UTILITIES COMMISSION )  
 )  
Instituting a Proceeding To )  
Investigate Implementing a )  
Decoupling Mechanism for Hawaiian )  
Electric Company, Inc., Hawaii )  
Electric Light Company, Inc., )  
and Maui Electric Company, )  
Limited. )  
\_\_\_\_\_ )

DOCKET NO. 2008-0274

ORDER GRANTING INTERVENTION; DISMISSING AS MOOT MOTIONS  
FOR LEAVE TO FILE REPLY MEMORANDA; DENYING MOTION  
FOR ENLARGEMENT OF TIME TO FILE MOTION TO INTERVENE;  
AND EXTENDING THE DEADLINES TO FILE A STIPULATED PROCEDURAL  
ORDER, STIPULATED PROTECTIVE ORDER, AND JOINT DECOUPLING PROPOSAL

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STATE OF HAWAII

PUBLIC UTILITIES  
COMMISSION

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FILED

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ORDER, STIPULATED PROTECTIVE ORDER, AND JOINT DECOUPLING PROPOSAL

By this Order, the commission grants intervention in this docket to LIFE OF THE LAND ("LOL"),<sup>1</sup> HAWAII RENEWABLE ENERGY ALLIANCE ("HREA"),<sup>2</sup> HAIKU DESIGN AND ANALYSIS ("HDA"),<sup>3</sup> HAWAII HOLDINGS, LLC, DOING BUSINESS AS FIRST WIND HAWAII ("First Wind"),<sup>4</sup> the STATE OF HAWAII, DEPARTMENT OF BUSINESS,

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<sup>1</sup>See LOL's Motion to Intervene, filed on November 3, 2008 ("LOL's Motion").

<sup>2</sup>See Motion to Intervene of HREA, filed on November 12, 2008 ("HREA's Motion").

<sup>3</sup>See Motion to Intervene of HDA, filed on November 12, 2008 ("HDA's Motion").

<sup>4</sup>See Motion to Intervene by First Wind, filed on November 13, 2008 ("First Wind's Motion").

ECONOMIC DEVELOPMENT, AND TOURISM ("DBEDT"),<sup>5</sup> HAWAII SOLAR ENERGY ASSOCIATION ("HSEA"),<sup>6</sup> and BLUE PLANET FOUNDATION ("Blue Planet").<sup>7</sup> In doing so, the commission dismisses as moot the motions for leave to file reply memoranda that were filed by LOL, HDA, Blue Planet, and HREA on November 24, 2008, November 25, 2008, November 26, 2008, and December 1, 2008, respectively (collectively, "Motions for Leave").

In addition, the commission denies the Motion for Enlargement of Time to File Motion to Intervene that was filed by TAWHIRI POWER LLC ("TPL") on November 17, 2008 ("Enlargement Motion").

The commission also extends the following deadlines that were addressed in the Opening Order: (1) the Parties shall have an additional fourteen days to file a stipulated (or proposed) procedural order and a stipulated (or proposed) protective order, from December 8, 2008 to December 22, 2008; and

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<sup>5</sup>See DBEDT's Motion to Intervene, filed on November 13, 2008 ("DBEDT's Motion").

<sup>6</sup>See Motion for Intervention of HSEA, filed on November 13, 2008 ("HSEA's Motion").

<sup>7</sup>See Blue Planet's Motion to Intervene, filed on November 13, 2008 ("Blue Planet's Motion").

By the commission's order initiating this proceeding that was filed on October 24, 2008 ("Opening Order"), the commission named as parties to this proceeding, HAWAIIAN ELECTRIC COMPANY, INC., HAWAII ELECTRIC LIGHT COMPANY, INC., MAUI ELECTRIC COMPANY, LIMITED (collectively, "HECO Companies"), and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an ex officio party pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62. The HECO Companies, the Consumer Advocate, and all of the intervenors allowed herein are collectively referred to as the "Parties."

(2) the deadline for the Consumer Advocate and the HECO Companies to file a joint decoupling proposal shall be extended to February 17, 2009.

I.

Background

On October 24, 2008, the commission opened this docket to examine implementing a decoupling mechanism for the HECO Companies that would modify the traditional model of rate-making for the HECO Companies by separating the HECO Companies' revenues and profits from electricity sales. As noted in the Opening Order, on October 20, 2008, the Governor of the State of Hawaii, DBEDT, the Consumer Advocate, and the HECO Companies (collectively, "HCEI Parties") entered into a comprehensive agreement designed to move the State away from its dependence on imported fossil fuels for electricity and ground transportation, and toward "indigenously produced renewable energy and an ethic of energy efficiency."<sup>8</sup> Included in the Agreement is a commitment by the HECO Companies to modify their traditional rate-making model by implementing a decoupling mechanism. The HCEI Parties agreed in principle to adopt a decoupling mechanism that "closely tracks the mechanisms in place

<sup>8</sup>Energy Agreement Among the State of Hawaii, Division of Consumer Advocacy of the Department of Commerce and Consumer Affairs, and the Hawaiian Electric Companies ("Agreement"), at 1. On January 31, 2008, the State of Hawaii and the U.S. Department of Energy entered into a Memorandum of Understanding designed to establish a partnership, called the Hawaii Clean Energy Initiative ("HCEI"). The partnership aims to have 70% of all of Hawaii's energy needs generated by renewable energy sources by 2030. The Agreement is a product of HCEI.

for several California electric utilities," and set forth certain agreed-upon criteria in the Agreement relating to their proposed mechanism.<sup>9</sup>

In the Opening Order, the commission named the HECO Companies and the Consumer Advocate as parties to the proceeding, and directed them to file a joint proposal on decoupling within sixty days of the date of the Opening Order. It also directed them (and any intervenors and participants) to file a stipulated (or proposed) procedural schedule and a stipulated (or proposed) protective order within forty-five days of the date of the Opening Order. Moreover, the commission explained that motions to intervene or participate must be filed within twenty days of the date of the Opening Order, pursuant to HAR § 6-61-57(3)(B), or by November 13, 2008.

## II.

### Intervention

HAR § 6-61-55 sets forth the requirements for intervention in commission proceedings. It states, in relevant part:

- (a) A person may make an application to intervene and become a party by filing a timely written motion in accordance with sections 6-61-15 to 6-61-24, section 6-61-41, and section 6-61-57, stating the facts and reasons for the proposed intervention and the position and interest of the applicant.

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<sup>9</sup>See Agreement, Section 28.

- (b) The motion shall make reference to:
- (1) The nature of the applicant's statutory or other right to participate in the hearing;
  - (2) The nature and extent of the applicant's property, financial, and other interest in the pending matter;
  - (3) The effect of the pending order as to the applicant's interest;
  - (4) The other means available whereby the applicant's interest may be protected;
  - (5) The extent to which the applicant's interest will not be represented by existing parties;
  - (6) The extent to which the applicant's participation can assist in the development of a sound record;
  - (7) The extent to which the applicant's participation will broaden the issues or delay the proceeding;
  - (8) The extent to which the applicant's interest in the proceeding differs from that of the general public; and
  - (9) Whether the applicant's position is in support of or in opposition to the relief sought.

HAR § 6-61-55(a) and (b). HAR § 6-61-55(d) further states that "[i]ntervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented."<sup>10</sup>

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<sup>10</sup>See also In re Application of Hawaiian Elec. Co., Inc., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975) (intervention "is not a matter of right but a matter resting within the sound discretion of the commission").

Here, LOL's Motion was filed on November 3, 2008; HREA's and HDA's Motions were filed on November 12, 2008; and First Wind's, DBEDT's, HSEA's, and Blue Planet's Motions were filed on November 13, 2008.

The HECO Companies filed memoranda in opposition to LOL's Motion, HREA's Motion, and HDA's Motion on November 12, 2008, November 21, 2008, and November 20, 2008, respectively. On November 24, 2008, the HECO Companies filed memoranda in opposition to First Wind's Motion and Blue Planet's Motion. On November 25, 2008, the HECO Companies filed a memorandum in opposition to HSEA's Motion.<sup>11</sup>

As asserted in several of the motions to intervene, the commission has generally been permissive in allowing intervention in policy-making investigative dockets, such as this

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<sup>11</sup>Declarations attached to the HECO Companies' Memorandum in Opposition to HSEA's Motion indicate that they were served with HSEA's Motion by mail in an envelope with a November 14, 2008 postmark. Based on the HECO Companies' representations, their Memorandum in Opposition to HSEA's Motion was timely. The Certificate of Service attached to HSEA's Motion states that service was made "via hand delivery or United States Mail[.]" It is not sufficient under the commission's rules to generally represent on a certificate of service that a filing was served by hand-delivery or U.S. mail without designation as to which parties were served by hand-delivery and which were served by mail. See Order: (1) Granting Participation and Motion for Leave to File Reply; (2) Clarifying the Commission's Rules Regarding Computation of Time; (3) Directing the Parties and Participants to Submit Statements of Position on the Completeness of the Application Within Twenty Days; and (4) Directing the Parties and Participants to File a Stipulated Procedural Schedule Within Forty-Five Days, filed on October 28, 2008, in Docket No. 2008-0025, at Section III. The commission cautions HSEA and all other intervenors allowed herein that they shall comply with the commission's rules of practice and procedure, including its rules on service of process.

docket.<sup>12</sup> The commission finds it appropriate to be consistent with that approach in this docket, and allow intervention to all parties who filed motions to intervene. Nonetheless, the intervenors allowed herein are cautioned that their participation as intervenors will be limited to the issues raised in this docket. The commission will preclude any effort by the intervenors to unreasonably broaden the issues, or unduly delay the proceeding, and will reconsider any intervenor's participation in this docket if, at any time, during the course of this proceeding, the commission determines any intervenor is unreasonably broadening the pertinent issues raised in this docket or is unduly delaying the proceeding.

Given that the commission grants intervention to LOL, HDA, Blue Planet, and HREA, the commission dismisses their Motions for Leave as moot.

### III.

#### Enlargement Motion

On November 17, 2008, TPL filed its Enlargement Motion, requesting an enlargement of time to file a motion to intervene in this docket on the following grounds:<sup>13</sup>

It is [TPL's] position that its Motion to Intervene is timely because public notice

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<sup>12</sup>The commission does not narrowly construe this proceeding as a rate case, but rather as a general investigation to consider implementing a decoupling mechanism for the HECO Companies.

<sup>13</sup>Concurrently with its Enlargement Motion, TPL also filed a Motion to Intervene. On November 26, 2008, the HECO Companies filed a Memorandum in Opposition to TPL's Enlargement Motion and its Motion to Intervene.

of the docket did not occur until October 29, 2008 when the Commission included an entry on the Order in its Daily Activity Report. Thus, [TPL] should have twenty (20) days from when the public notice was available instead of twenty (20) days from when the Order Initiating the Investigation was issued. Since public notice was not made available through the Commission's Daily Activity Report until October 29, 2008, [TPL] should have until November 18, 2008 to file its Motion to Intervene.<sup>14</sup>

HAR § 6-61-23, governing requests for an enlargement of time, provides in relevant part:

(a) When by this chapter or by notice or by order of the commission, any act is required or allowed to be done at or within a specified time, the commission for good cause shown may at any time, in its discretion:

- (1) With or without motion or notice, order the period enlarged, if written request is made before the expiration of the period originally prescribed or as extended by a previous order; or
- (2) Upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect[.] [Emphasis added.]

As set forth above, pursuant to HAR § 6-61-57(3)(B), the deadline to file motions to intervene or participate in this proceeding was twenty days after the filing date of the Opening Order, which was November 13, 2008. Because the Enlargement Motion was filed after this deadline, on November 17, 2008, the commission applies the "excusable neglect" standard in HAR § 6-61-23(a)(2), cited above, to its review of

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<sup>14</sup>Enlargement Motion at 3 (footnote omitted).

the Enlargement Motion. The excusable neglect standard is a strict standard requiring a showing that the failure to timely file with the commission was due to circumstances beyond TPL's control.<sup>15</sup> Lack of legal sophistication and ignorance of the law do not constitute excusable neglect. Pogia v. Ramos, 10 Haw. App. 411, 416, 876 P.2d 1342 (Haw. Ct. App. 1994).

Upon review, the commission does not find "excusable neglect" to justify granting the Enlargement Motion. The commission's rule on the deadline for intervention is clearly set forth in HAR § 6-61-57(3)(B), and was also addressed in the Opening Order. More importantly, TPL's position in the Enlargement Motion that the deadline for intervention was

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<sup>15</sup>In re Public Utilities Commission, Docket No. 05-0195, Order No. 22040 (Sept. 21, 2005). See also Hall v. Hall, 95 Hawai'i 318, 320, 22 P.3d 965, 967 (2001); Enos v. Pacific Transfer & Warehouse, Inc., 80 Hawai'i 345, 350, 910 P.2d 116,121 (1996) (noting that the excusable neglect standard was a "strict standard, requiring a showing that the failure to timely file a notice of appeal was due to circumstances beyond the appellant's control"); In re Aikane Interpacific Corp., dba Maika'i Ohana Tours, Docket No. 05-0095, Order No. 21893 (June 24, 2005) (finding that the moving party's assertion that it was delayed in securing legal representation did not rise to the level of excusable neglect); In re Hawaii Water Service Co., Inc., Docket No. 03-0275, Order No. 21059 (June 17, 2004) (finding that docket deadlines, departure of the supervising attorney, sick leave requests and scheduling commitments did not constitute excusable neglect); In re Puuwaawaa Waterworks, Inc., Docket No. 03-0369, Order No. 21021 (June 2, 2004) (finding that an underestimation of the time it takes for a mail delivery did not rise to the level of excusable neglect); In re Soltur, Inc., Docket No. 00-0063, Order No. 18114 (October 4, 2000) (denying a motion for the enlargement of time based on excusable neglect where the movant claimed that its failure to act was due to the substitution of counsel); In re Laie Water Co., Inc., Docket No. 00-0017, Order No. 17942 (August 2, 2000) (stating that ignorance of the rules governing the practice and procedure before the commission, or mistakes construing such rules, do not constitute excusable neglect).

November 18, 2008 is belied by the fact that TPL timely filed a motion to intervene in the feed-in tariffs docket, Docket No. 2008-0273, by the November 13, 2008 deadline.<sup>16</sup> The Opening Order in this docket and the order opening the feed-in tariffs docket were filed on the same day, October 24, 2008, such that under HAR § 6-61-57(3)(B), the deadline for intervention motions in both dockets was the same -- November 13, 2008. Moreover, notice of the opening of the feed-in tariffs docket appeared right above notice of the Opening Order in this docket in the October 29, 2008 Daily Activity Report.<sup>17</sup> In sum, there appears to be no excusable reason why TPL did not timely file a motion to intervene in this docket, and the Enlargement Motion should be denied.

#### IV.

##### Extension for Stipulated Procedural Order and Stipulated Protective Order

In the Opening Order, the commission directed the Parties (and any intervenors and participants) to file a stipulated (or proposed) procedural order and a stipulated (or proposed) protective order within forty-five days of the date of the Opening Order. Under HAR § 6-61-23(a)(1), the commission hereby extends the deadline given in the Opening Order for the Parties to file a stipulated (or proposed)

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<sup>16</sup>The commission may take official notice of its records in other dockets, pursuant to HAR § 6-61-48.

<sup>17</sup>See Exhibit A, attached to the Enlargement Motion.

procedural order and a stipulated (or proposed) protective order from December 8, 2008 to December 22, 2008.

V.

Extension for Joint Decoupling Proposal

In the Opening Order, the commission directed the HECO Companies and the Consumer Advocate to file a joint proposal on decoupling within sixty days of the date of the Opening Order. Under HAR § 6-61-23(a)(1), the commission hereby extends the deadline to file a joint decoupling proposal from December 23, 2008, to February 17, 2009.

VI.

Orders

THE COMMISSION ORDERS:

1. The following intervention motions are granted: (1) LOL's Motion; (2) HREA's Motion; (3) HDA's Motion; (4) First Wind's Motion; (5) DBEDT's Motion; (6) HSEA's Motion; and (7) Blue Planet's Motion.
2. The Motions for Leave are dismissed as moot.
3. The Enlargement Motion is denied.
4. The Parties are granted an extension of time from December 8, 2008 to December 22, 2008 to file a stipulated (or proposed) procedural order and a stipulated (or proposed) protective order.

5. The HECO Companies and the Consumer Advocate are granted an extension of time to file a joint decoupling proposal, from December 23, 2008 to February 17, 2009.

DONE at Honolulu, Hawaii DEC - 3 2008.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Carlito P. Caliboso, Chairman

By   
John E. Cole, Commissioner

By   
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:

  
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2008-0274.laa

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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